

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JAMES KING,

Plaintiff, No. 1:16cv343

vs.

UNITED STATES OF AMERICA, et al.,

Defendants.

Before:

THE HONORABLE JANET NEFF,
U.S. District Judge
Grand Rapids, Michigan
Tuesday, October 4, 2016
Promotion Conference Proceedings

APPEARANCES:

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REPORTED BY: MS. KATHY J. ANDERSON, RPR, FCRR

October 4, 2016

PROCEEDINGS, 9:59 a.m.

THE LAW CLERK: All rise, please. Court is in session. You may be seated.

THE COURT: Good morning, everybody.

MR. JAICOMO: Good morning.

MS. MAZZOCCO: Good morning, Your Honor.

THE COURT: This is the date and time set for a premotion conference in case number 1:16cv343, James King versus the United States of America, et al. Counsel, may I have appearances and introductions.

MR. JAICOMO: Good morning, Your Honor. Patrick Jaicomo of Miller Johnson for Mr. King.

MR. PORTINGA: Your Honor, Andy Portinga for the plaintiff.

MS. MAZZOCCO: Nicole Mazzocco and Ryan Cobb on behalf of the federal defendants, Your Honor.

MS. REWA: Kristen Rewa on behalf of Officer Morris.

MS. BONDY: Lindsay Bondy also on behalf of Officer Morris.

THE COURT: Thank you. Let's just preliminarily talk a little bit about what we're here for. Premotion conference has a number of goals, I guess. First of all, to determine the exact nature of the dispositive motions that the parties wish to file; second, to determine whether the case is currently

1 ripe for the filing of dispositive motions, to try to sort
2 through the proposals, and in this case there are three; to
3 determine whether they have been adequately vetted to the point
4 where everybody knows exactly what it is they want to do; and
5 to get rid of anything that is unnecessary; and, finally, to,
6 assuming we get through all of those hurdles, to set some
7 briefing schedules.

8 Now, we have an amended complaint of four counts which
9 relate to the individual defendants and the government
10 defendants in various ways. And I have, I do have some
11 questions, if I can find my written sheet. Oh, in addition to
12 the premotion conference, we want to talk a little bit about
13 the defendant's joint motion to stay discovery pending
14 resolution of the dispositive motions.

15 The first question that I have is for the government
16 defendant and the Brownback and Allen defendants. You have
17 indicated that you want to pursue either a motion to dismiss or
18 in the alternative a motion for summary judgment. And we need
19 to talk about exactly what it is you want there because, partly
20 because of the motion to stay discovery. If you are pursuing a
21 Rule 12 motion to dismiss exclusively, that puts one cast on
22 the motion to stay discovery, but if you are also pursuing or
23 thinking you might want to pursue a Rule 56 motion for summary
24 judgment, that might have a different cast on the motion to
25 stay discovery. So I'm interested to know whether you are

1 wedded to both of those alternatives; if you are, in light of
2 the motion to stay, whether you are abandoning the Rule 56
3 motion. Exactly where are you on your thinking on that?

4 MS. MAZZOCCO: Your Honor, the Rule 56 motion is
5 largely in the alternative. We believe that nearly all of the
6 arguments that we are going to be making can be covered by the
7 Rule 12(b) rubric either under Rule 12(b)(6) for failure to
8 state a claim, or Rule 12(b)(1), lack of subject matter
9 jurisdiction. The evidence that we will principally be citing
10 to we believe is fairly considered part of the complaint. We
11 have an entire trial record here, Your Honor, that was
12 incorporated into and attached to the plaintiff's SF95 that was
13 filed with the government and was referred to in the complaint,
14 as indeed it must be to get past the subject matter
15 jurisdiction hurdle. So we believe the SF95 is fair game under
16 a 12(b) standard, and we will largely be relying on items
17 already attached thereto.

18 THE COURT: But you are holding on to the alternative.
19 Again, what is your, in terms -- I have to tell you the motion
20 to stay discovery has really munged up the works a little bit
21 here. You are prepared to proceed on the Rule 12 part of your
22 motion, but what?

23 MS. MAZZOCCO: But we would like to at this time also
24 present the Rule 56 motion in the alternative. Particularly to
25 the extent that the Court might disagree with us that the SF95

1 ought not to be properly incorporated. Moreover, Rule 56 will
2 very appropriately force the plaintiff to identify vis-a-vis
3 the affidavit mechanism in that rule what discovery they think
4 is necessary here.

5 We have had a multi-day trial proceeding in which
6 every witness that the plaintiff has identified on their
7 initial disclosures has testified and been cross-examined. We
8 have the exhibits to that trial. There is an extensive record
9 here already, Your Honor. We believe the undisputed facts have
10 already been brought out and identified, and it's our view that
11 based on those undisputed facts, including plaintiff's trial
12 testimony, that we prevail.

13 THE COURT: Well, let's hear what the plaintiff has to
14 say.

15 MR. JAICOMO: As to the subject matter jurisdiction, I
16 think that's largely a meritless claim, Your Honor. In any
17 case, they are stepping outside the pleadings which would bring
18 us under Rule 56. To the extent that that's permissible, I
19 have the SF form right here and it very clearly incorporates
20 the actions of both the FBI agent and Detective Allen.

21 So I don't think there is any "there" there. With
22 respect to the other claims, all of them rise or fall on issues
23 of fact. Yes, the trial transcript and the testimony in that
24 trial will be relevant. But we need to depose these
25 defendants, we need to do our own investigation, and for what

1 it's worth, we don't at this point have the trial exhibits.
2 Which is one of the things we requested in our initial
3 discovery requests.

4 THE COURT: And there's been no response to that, as I
5 understand it.

6 MR. JAICOMO: Other than to file the motion on the
7 30th day.

8 THE COURT: Okay. Well, I think what we need to do
9 then is to hear briefly from each of the three sets of
10 defendants, I guess you could say, on their claims for
11 entitlement or their desires to go ahead with dispositive
12 motions, then hear some response from the plaintiff and then
13 we'll go from there.

14 MS. MAZZOCCO: Your Honor, would you like us to
15 address the motion to stay first or the merits of our
16 dispositive motion?

17 THE COURT: I think, I really do think what you need
18 to do is incorporate the motion to stay into your claims for
19 the premotion conference.

20 MS. MAZZOCCO: Certainly. Would you like to hear from
21 the government first, Your Honor?

22 THE COURT: Yes, I would.

23 MS. MAZZOCCO: Okay. So with regard sort of setting
24 the stage with the motion to stay discovery. We believe that
25 the Sixth Circuit as well as the Supreme Court has made it

1 crystal clear that where you have a claim of qualified immunity
2 the motion must be resolved before discovery proceeds.

3 And this case is a classic example of why that ought
4 to be so.

5 We have arguments based on the plaintiff's complaint
6 itself, and the undisputed facts, including plaintiff's
7 testimony in the trial, as to why all of these claims ought to
8 fail. But in particular, the claims against the officers as
9 individuals.

10 So the first point relates to the Section 1983 claims
11 against the two federal task force officers. There's no
12 factual dispute here --

13 THE COURT: Well, let's go back a minute. You say the
14 issue is crystal clear. I don't really see it that way. And
15 don't you have some question, at least I have some question
16 based on what I've read so far, I have some question as to
17 whether they both were federal agents, and certainly whether
18 objectively from the position of the, of Mr. King, the
19 plaintiff, whether they were federal agents. And isn't that a
20 fact question?

21 MS. MAZZOCCO: It is not, Your Honor. If you look at
22 even the complaint itself, it refers to the fact that Officer
23 Allen was a deputized marshal. And plaintiffs have been aware
24 of that all along. It's included in their SF95, for example.
25 There is no question of fact I believe as to whether or not

1 Task Force Officer Allen was a deputized federal marshal acting
2 in a federal investigation. And moreover, this particular
3 piece, this 1983-piece, is an issue of subject matter
4 jurisdiction. So we are under 12(b)(1). We do anticipate
5 providing Your Honor with an affidavit that includes as an
6 attachment the sworn, the form that one fills out to become a
7 deputized U.S. Marshal, as well as the fact that this is a
8 federal investigation that these gentlemen were engaged in.
9 There is absolutely no question of fact as to that issue. So
10 we have a federal task force officer and an FBI agent engaged
11 in a federal fugitive investigation with relation to
12 Mr. Davidson here.

13 So the federal character, particularly if you look at
14 the case that we did cite to Your Honor in our premotion
15 conference statement, and then also in the additional cases
16 that we will be providing in our briefing, indicates that where
17 you have a federal task force officer engaged in a federal
18 investigation, there is absolutely no question that there is
19 not a 1983 claim here. It's too federal in character, Your
20 Honor. And plaintiffs in their response did not indicate
21 anything that would change that fact. Now certainly they will
22 have the opportunity as well to respond in their briefing on
23 the 1983 issue.

24 THE COURT: Okay.

25 MS. MAZZOCCO: So then the second, the second set of

1 claims would be the qualified immunity claims. Those would
2 apply to the 1983 claims, if Your Honor were to disagree with
3 us and allow those to move forward, as well as to the Bivens
4 claims against our two federal task force officers.

5 And so here the first piece of the action that we
6 would want to examine would be the stop itself.

7 So here we believe that there was nothing in here to
8 violate the search and seizure clause, Your Honor. They had,
9 first of all, a right to approach Mr. King and ask some
10 questions which is what they did here. But even if you wanted
11 to consider the stop a Terry stop, we believe that we had
12 reasonable suspicion and a right under Terry to stop Mr. King
13 in this scenario.

14 THE COURT: Even though he didn't look anything at all
15 like the guy you were looking for.

16 MS. MAZZOCCO: He didn't. That is not correct, Your
17 Honor. He was a Caucasian gentleman; he was of a thin build;
18 he was in a similar age range as the suspect; he had short dark
19 hair; he had glasses; he was of a similar height; he was in the
20 same location at the same time of day walking in the same
21 direction and wearing very similar clothing. And that's all in
22 the trial court record, Your Honor, and there is no dispute as
23 to those facts. I mean they have been testified to; there is
24 no evidence to the contrary.

25 And so you have all of these hits that Mr. King is

1 very similar to Mr. Davidson. So they had the right to at the
2 very least stop and question him, or to engage in a Terry stop
3 here, Your Honor.

4 So we believe that the stop is clearly constitutional
5 and that none of the elements of qualified immunity can be
6 satisfied by the plaintiff, Mr. King.

7 You know, moreover, they move into, you know, they ask
8 him a couple of questions. So they ask him what is his name.
9 There is no dispute that he responds James. He doesn't respond
10 with his full name. They ask him for his identification.
11 There is no dispute that he told him, you know, I don't have
12 any ID. There is also no dispute that he initially complied
13 with the officers's instructions and allowed them to begin a
14 pat down.

15 THE COURT: What's the significance of not having any
16 ID?

17 MS. MAZZOCCO: Well, Your Honor, one, it raises the
18 officers's level of suspicion that he did not give his full
19 name and did not produce ID. And then as we move forward, when
20 they feel, when they do the pat down and they recognize, you
21 know, that there is an object, and they pull it out and they
22 realize it's a wallet, those officers then have probable cause
23 to arrest him for violating 18 U.S.C. 1001, which is when you
24 are lying to a federal officer engaged in --

25 THE COURT: Oh, man, come on.

1 MS. MAZZOCCO: Absolutely, Your Honor. I believe the
2 case law will bear us out on that point. That when you have
3 lied to a federal officer about whether --

4 THE COURT: Did they even look in the wallet to see if
5 there was identification in there to confirm that he was lying?

6 MS. MAZZOCCO: They did not have time, Your Honor,
7 because it was at that point immediately when the wallet was
8 removed it's undisputed that Mr. King swings around and flees.

9 THE COURT: So they didn't know if he was lying. They
10 didn't know what was in the wallet.

11 MS. MAZZOCCO: But they certainly had reasonable
12 suspicion, Your Honor, that there was an identification and a
13 very large, you know, wallet which was later borne out as there
14 was ID in the wallet.

15 THE COURT: Wow.

16 MS. MAZZOCCO: So, Your Honor, when we look at the pat
17 down we believe that we had a right under Terry to proceed with
18 that pat down. We believe that was a constitutional procedure,
19 and we also believe that we had a right to remove the wallet.
20 So there was evidence presented at trial that a wallet or a
21 wallet like --

22 THE COURT: What was the result of the trial?

23 MS. MAZZOCCO: I'm sorry?

24 THE COURT: What was the result of the trial?

25 MS. MAZZOCCO: Not guilty, Your Honor.

1 THE COURT: Okay.

2 MS. MAZZOCCO: So when the object in the pants was
3 identified by Task Force Officer Allen, there is reason under
4 Terry to think that you can remove that item because it could
5 be a weapon. And there was testimony offered at trial by
6 Federal Task Force Brownback that this type of item can conceal
7 a weapon. So under Terry initially they were removing the
8 wallet, what turned out to be a wallet, to determine whether or
9 not that was a weapon as part of a Terry pat down. It was at
10 this point, Your Honor, that it's undisputed Mr. King swings
11 around and flees. So that's the pat down. We believe that we
12 had a right under Terry to do everything that we did during
13 that piece of the encounter.

14 So then turning to the next portion, taking Mr. King
15 to the ground. Did we have a right to do that? And our
16 position is yes. Absolutely. When you're looking at excessive
17 force it's a standard of reasonableness here. We are looking
18 at the severity of the crime, so here we had a felon, or
19 suspected felon that was who we believed the gentleman to be.

20 THE COURT: What was the underlying felony of the guy
21 you were looking for?

22 MS. MAZZOCCO: Home invasion.

23 THE COURT: Okay.

24 MS. MAZZOCCO: And then secondarily did we have an
25 immediate threat to the safety of others around. Yes, we

1 believed so. We had a fleeing felon who had admitted that he
2 had at least one weapon on him, the knife that was found during
3 the initial portion of the Terry search.

4 And the third point is did we have someone who was
5 actively resisting an arrest or fleeing, and, yes, we had both
6 of those things here. We had a suspect who was fleeing.

7 So considered from the perspective of a reasonable
8 officer as excessive force requires us to do, we had a right to
9 take Mr. King to the ground.

10 Now, the next point is the process that was used to
11 subdue Mr. King and get him into cuffs. Did we have a right to
12 do that? And yes, we believe that we did. First, let's
13 consider Agent Brownback's conduct. There is no excessive
14 force to be had here, Your Honor. They haven't identified any
15 particular action on the part of Officer Brownback that they
16 are objecting to. He was engaged in the lower half of Mr. King
17 during the struggle trying to get the handcuffs on him while he
18 was flailing about.

19 So now let's turn to Task Force Officer Allen. They
20 have identified principally two things that they object to in
21 Officer Allen's conduct. The first is what they refer to as a
22 choke hold. Now we would dispute the factual and in future we
23 would dispute whether or not a choke hold was applied. But
24 even assuming that it was, Your Honor, let's assume that's what
25 happened. It is acceptable to use a choke hold in this type of

1 scenario where you have a fleeing and resisting person as
2 Mr. King was here. That's undisputed. And then the second
3 piece is the --

4 THE COURT: Isn't it disputed whether they identified
5 themselves as law enforcement officers? Didn't Mr. King
6 indicate he did not hear any indication of that?

7 MS. MAZZOCCO: The extent of the identification is
8 absolutely disputed, Your Honor. Our folks will say that they
9 identified themselves as federal task officers and that they
10 were seeking to arrest a fugitive, et cetera. Mr. King says
11 they did not use their words, they did not say those things;
12 that is his position. But he does admit that they had their
13 badges. Their badges were visible. And the photographic
14 evidence that we have in this case, Your Honor, that was part
15 of the trial bears that out. So everyone agrees that at the
16 very least their badges were visible.

17 And then we also have Mr. King initially complying
18 with the pat down.

19 So we believe that there is no question that Mr. King
20 knew that these were federal officers, whether he believed it
21 or not.

22 So --

23 THE COURT: He knew it but he didn't believe it?

24 MS. MAZZOCCO: Well, his position as I understand it,
25 Your Honor, is that he initially complied, and then when they

1 took his wallet out he thought they were robbing him and that
2 they were not federal officers. But there is no dispute, Your
3 Honor, that the badges were visible, and that he also initially
4 complied with the pat down.

5 THE COURT: It was dark when this happened, right?

6 MS. MAZZOCCO: Broad daylight, Your Honor.

7 THE COURT: Oh, I thought it was real early in the
8 morning.

9 MS. MAZZOCCO: I believe it was broad daylight, middle
10 of the day. I would have to look at the specific time. I do
11 not believe it was twilight or early dawn hours. Middle of the
12 day, Your Honor.

13 THE COURT: Okay.

14 MS. MAZZOCCO: I believe. So then returning to the
15 second complaint in relation to Task Force Officer Allen's
16 conduct. Now, that has to do with the punching. So there what
17 happened was, and again this is undisputed, that Mr. King takes
18 a bite out of Officer Allen's arm, you know, so forcefully that
19 it went through several layers of clothing, and there is
20 substantial bruising on the officer's arm. At that point when
21 the teeth clamp on the arm, Officer Allen does begin punching
22 Mr. King. And as indicated in the trial, you know, as hard and
23 fast as he could because he needed Mr. King to release that
24 bite.

25 So there, again, when you have a person biting an

1 officer in that fashion, it is absolutely permissible to punch
2 them as hard and fast as you can. Because that level of
3 resistance allows that reciprocal force by Officer Allen. And
4 again we anticipate that the case law that we will cite to Your
5 Honor in our briefing will bear that out.

6 So then the next federal claim, the next moment in
7 time that we are looking at, is the malicious prosecution
8 claim. And so here we believe that based on the undisputed
9 facts, there was probable cause to proceed with Mr. King's
10 trial here. You have Mr. King saw a badge, he responded in
11 part, typical police behavior proceeding with a pat down, he
12 responded to what's your name, he responded to do you have ID,
13 to do you have a weapon? He places his hands, you know, above
14 his head as one would expect, and then during the pat down when
15 they, you know, pull out the wallet he flees. And then he
16 proceeds to struggle, bite Officer Allen, continue to try to
17 escape, et cetera. You know, indeed he was struggling so
18 strongly that the two officers were not able to subdue him. A
19 third party had to be brought in to help get this particular
20 individual handcuffed. So we believe there is absolutely
21 probable cause to proceed with the state court proceedings that
22 they brought as to resisting arrest.

23 And so because there was probable cause there can be
24 no malicious prosecution claim under the Constitution. And
25 that is true, notwithstanding the fact that Mr. King believes

1 that the officers lied as to, you know, identifying themselves
2 as officers. Even if you take all of those facts out, probable
3 cause still exists. And for that reason the malicious
4 prosecution claim cannot proceed.

5 So in short, Your Honor, we believe that none of the
6 prongs of qualified immunity can be refuted by the plaintiff.
7 There were no constitutional violations here; if there were
8 constitutional violations they were not clearly established,
9 and then the officers always behaved throughout in an
10 objectively reasonable manner. So none of those three prongs
11 can be refuted by the plaintiff as the Sixth Circuit has laid
12 them out.

13 So then turning to the next set of claims, Your Honor.
14 The FTCA claims. Why do we think that we prevail there.
15 Principally for two reasons: The first reason being that the
16 common law protection that Michigan law provides to law
17 enforcement officers in this type of a scenario steps in here
18 and protects our officers. This Court recently reached that
19 conclusion in the Valdez case that we have cited. And the
20 question then becomes were these officers acting during the
21 normal course of their employment; we don't believe there is
22 any dispute to that here. These were federal task force
23 officers acting to arrest someone that they believed was the
24 fugitive they were looking for. Second, malice, wantonness, or
25 reckless indifference to the common dictates of humanity.

1 That's the second prong. Again, for all the reasons we believe
2 that the conduct was constitutional, we believe that this
3 element cannot be satisfied.

4 And then the third point is whether or not their
5 actions were discretionary. The Michigan case law bears out
6 the fact that when you are choosing to arrest someone and
7 engaging in those type of motions, these are discretionary
8 decisions on the part of the officers. So we believe that
9 common law protection prevents the FTCA claims from proceeding
10 here.

11 And then turning to the specific tort claims, false
12 imprisonment, false arrest, assault and battery, malicious
13 prosecution, and intentional infliction of emotional distress,
14 we believe, and I can go into further detail if Your Honor
15 would like, that all of those claims fail because again we had
16 constitutional actors here. You know, there was probable
17 cause. This is not -- because they were acting in a
18 constitutional and acceptable manner for officers, this conduct
19 was not so outrageous that it reaches the level required for
20 intentional infliction of emotional distress claim.

21 THE COURT: Okay. Let me hear from the plaintiff,
22 please.

23 One second, I'm sorry.

24 MS. MAZZOCCO: Yes, Your Honor.

25 THE COURT: With regard to the stay issue on

1 discovery, what, if anything, what discovery if any is, would
2 be required or needed to, for the defendant, government, and
3 the two agents to fully proceed on this motion?

4 MS. MAZZOCCO: Your Honor, I don't believe any
5 discovery would be required to respond to our motion, if that's
6 the question you're asking.

7 THE COURT: I'm asking whether you need any discovery.

8 MS. MAZZOCCO: Oh, we do not, Your Honor.

9 THE COURT: All right. Thank you.

10 MR. JAICOMO: So I'll start where they started which
11 was with this issue of discovery, and qualified immunity, and
12 all that stuff. As we said in our briefing response, the
13 Alspaugh case is very clear.

14 THE COURT: Talk a little louder, and talk a little
15 slower, please.

16 MR. JAICOMO: Sure, I apologize. The Alspaugh case is
17 pretty clear here where it says when you have a well pleaded
18 claim of clearly established law, then discovery is not only,
19 is not only allowed but appropriate. Here that's the case. I
20 don't see any basis to conclude that there is no clearly
21 established law here. We are talking about unreasonable search
22 and seizure and excessive force. Those claims have been
23 clearly established under the Fourth Amendment; that's the
24 basis for our claims, so that issue until this morning was
25 undisputed.

1 With respect to the rest, everything they throw up
2 involves significant issues of material fact. So for that
3 reason alone I don't think the motion to stay discovery should
4 prevail.

5 But turning to the substance of their proposed motions
6 to dismiss.

7 THE COURT: Well, let's go back a minute.

8 MR. JAICOMO: Sure.

9 THE COURT: With regard to staying discovery, since we
10 haven't had a Rule 16 in this case yet, would you argue that
11 discovery ought to have no limitations, or that it should be
12 limited in some sense based on the fact that these motions go
13 ahead?

14 MR. JAICOMO: I think based on the arguments that I'll
15 articulate here momentarily with respect to the fact that all
16 of their claims rise and fall on issues of fact that they ask
17 the Court to substitute their version of facts --

18 THE COURT: You're going too fast again.

19 MR. JAICOMO: That they ask the Court to substitute
20 their version of facts for ours, I think for that reason alone
21 there is no basis to stall discovery here because they have not
22 provided any legal argument for why these claims would be
23 dismissed or given summary judgment.

24 THE COURT: So you would argue that there should be
25 unlimited discovery on any and all aspects of the litigation

1 while the motions are pending.

2 MR. JAICOMO: Well, I would be more than happy to
3 discuss with opposing counsel and the Court what reasonable
4 limitations should be applied; for example, we haven't
5 requested at this point to depose the defendants. We would
6 like to do that at some point. I'm not suggesting that we
7 should be allowed to take any sort of potentially relevant
8 document at this point. But I think the discovery requests
9 that we have outstanding are fairly limited. And to the extent
10 that the Court thinks that it would be more reasonable to limit
11 them further, I would be more than happy to have that
12 discussion.

13 THE COURT: You might be having it with Judge Carmody.
14 I think that probably would be the end result here. Unless you
15 could reach some accord with defense counsel.

16 MR. JAICOMO: Sure.

17 THE COURT: Okay. Go ahead.

18 MR. JAICOMO: Turning to the substance of their
19 claims. Starting with the 1983 claim. I mean while they would
20 like to characterize this as or Detective Allen as a federal
21 task force officer, it's plain that he is a Grand Rapids police
22 detective; he filed a Grand Rapids police report after this
23 incident which was an arrest in Grand Rapids on a Michigan
24 warrant for a Michigan crime, which led to a Michigan criminal
25 trial and acquittal by a Michigan jury. Based on those

1 undisputed facts alone, it's very clear that even though
2 Special Agent Brownback is an FBI agent, and even if Detective
3 Allen was properly deputized as a U.S. Marshal, they were still
4 operating under color of state law.

5 As the Sixth Circuit has held, it's your acts that
6 determine whether you are acting under color of state law, not
7 who employs you or what clothing you're wearing. And that's
8 consistent with the language of 1983 which says acting under
9 color of state law. So there are a number of cases where joint
10 actions between state and federal officers make the action fall
11 under state law. I think here it's very clear that they did.
12 We have not seen a single piece of evidence other than bald
13 assertions that there was even an FBI investigation here, but
14 there is no federal crime that's ever been alleged with respect
15 to Mr. Davidson who was the suspect they were looking for.
16 Mr. King was never prosecuted for any federal crimes. So I
17 think it's difficult to say that there are any facts to support
18 a claim that both Agent Brownback and Detective Allen don't
19 fall under 1983 under these circumstances, and even if there
20 are, it's all issues of fact for the jury to decide.

21 With respect to qualified immunity, again, as we
22 pointed out in our response to the premotion conference
23 request, every single step of the way involves issues of
24 material fact. And moreover, a lot of the basis for which the
25 government would like to claim qualified immunity is

1 essentially them manufacturing after the particular segment of
2 the interaction backward looking retrospective probable cause.
3 So, for example, to say that because they witnessed him
4 resisting they had probable cause to arrest him. Well, he
5 didn't resist until they had already violated his
6 constitutional rights in the first place. And as also pointed
7 out in our response brief, under Michigan law it's a well-known
8 precept that you're allowed to resist an unlawful arrest which
9 is absolutely what was happening here. But, for instance, the
10 other examples they bring out are the wallet. So is the wallet
11 sufficient to establish this lying to a federal officer?

12 THE COURT: Yeah, that's a little beyond the pale as
13 far as I'm concerned. So you can go on from there.

14 MR. JAICOMO: Sure. I would just briefly also point
15 out that they have also used the wallet, at trial Special Agent
16 Brownback said that's a wallet. And now we are talking about
17 well maybe was it a concealed weapon. He thought it was a
18 wallet and that was the basis for all of this suspicion,
19 unfounded or not.

20 With respect to Mr. King fitting the description,
21 essentially he was just a white male in the area. That's it.
22 It could have been me walking down the street in that, I think
23 there was a five or six-year age range, there was a seven-inch
24 height disparity. There is -- and I can't say with certainty
25 but I'm pretty sure at least one of the officers at trial

1 admitted that he looks nothing like Erin Davidson, the suspect
2 of this crime.

3 So based on that alone, I don't think there was
4 reasonable suspicion for the Terry stop. Which in fact at
5 trial they said it wasn't a Terry stop; they said we determined
6 that it was, this was Mr. Davidson and we had probable cause at
7 that point to make the arrest. There wasn't probable cause
8 either. He doesn't look anything like the guy. He was just
9 walking down the street. And these two strangers who look
10 nothing like cops, everyone is on agreement on that, I have a
11 picture here, it's one they attached to their first set of
12 pre-motion conference requests of the bite. And it shows
13 Detective Allen in his black sports center T-shirt, no badges
14 in the picture, he's got a goatee, he is wearing a baseball
15 hat. At the end of the day the reason these officers were
16 dressed like they were and they were driving a black SUV was so
17 people could not tell that they were police officers. And so
18 now to flip that on its head and say Mr. King should have known
19 that these were cops, I think is just not supported by the
20 facts. But in any case, raises an issue of fact with respect
21 to the entire chain of reasonable suspicion and probable cause.

22 So then that brings us to the actual use of force
23 against Mr. King. It is undisputed that he thought he was
24 being mugged and turned to run. Detective Allen tackled him.
25 Special Agent Brownback held his feet while Detective Allen

1 then choked Mr. King. And to the extent that these facts are
2 disputed, they are issues of fact that need to be resolved by a
3 jury. At that point Mr. King, fearing for his life, rightly
4 so, bit Detective Allen who he still thought was a mugger and
5 calling out to bystanders, please call 911, people, there is a,
6 there were witnesses who heard him calling 911, they called 911
7 on his behalf, they did not know that these are police
8 officers. We do have some footage of the aftermath taken by
9 bystanders who they were literally screaming as the uniformed
10 officers show up. He is not okay; they were pounding him, they
11 were being brutal, et cetera, et cetera.

12 I mean with respect to the emotional distress claim,
13 it's about as close in a real world scenario that you could
14 have an actual unbiased third party say outrageous. There were
15 literally two women screaming in the faces of these cops what
16 you were doing was well beyond the pale.

17 So in any case, we also have Detective Allen's trial
18 testimony that he hit James as hard as he could, as fast as he
19 could, and as many times as he could. Clearly there is an
20 issue of fact there as to whether that force was excessive
21 under these circumstances.

22 If you saw from the pictures in our complaint, James's
23 eyeballs turned black after this incident because of the
24 choking and the beating.

25 So I really don't see how there is any basis for

1 dismissal or summary judgment with respect to the excessive
2 force claim.

3 Some courts have considered deadly choke holds to be
4 deadly force. I don't see how that could possibly be justified
5 here.

6 Turning to the malicious prosecution. That's
7 predicated mostly on false statements by the officers that they
8 identified themselves, and in fact at trial Detective Allen
9 stated that when they approached Mr. King Special Agent
10 Brownback pulled out his wallet credential to show James, hey,
11 I'm an FBI agent. And then when Special Agent Brownback took
12 the stand he said, no, I didn't do that and I would never do
13 that because when I'm approaching a suspect I want both my
14 hands to be free so I can do whatever I need to do. So we know
15 that there were untruths told at the trial. It's James's
16 position that these two never identified themselves as
17 officers. And to the extent that any inference could be drawn
18 by these lanyard badges, first of all, there is no way that you
19 could assume that a bystander on the street would know that
20 they were federal agents even if they were supposed to assume
21 that these were officers. But as I said earlier, these guys
22 were dressed in plain clothes. They had goatees, baseball
23 caps, they were wearing jeans, they had a black SUV; nobody
24 knew that these were cops. Even after the whole fight broke
25 out.

1 So I think that's neither here nor there.

2 With respect to the claim that Special Agent Brownback
3 had no excessive force claim against him, there is absolutely
4 an excessive force claim for someone who essentially holds your
5 arms behind their back while another person pummels them which
6 is effectively what happened here. Brownback was holding
7 James's legs. In any case, he was attempting to hold him still
8 while Detective Allen punched him in the face.

9 That's all. Those are all my comments on the 1983
10 claim. I'll turn to the FTCA claim unless you have any
11 questions.

12 THE COURT: Okay.

13 MR. JAICOMO: With respect to the FTCA claim, as we
14 acknowledge in our response, the Valdez case is a problem. But
15 we think it's incorrectly decided, and it reaches essentially
16 an absurd outcome based on the language of the FTCA when it's
17 coupled with this common law governmental immunity issue. And
18 the reason that is because the FTCA specifically says we want
19 to waive our governmental immunity for governmental actors
20 operating in the scope of their employment. And then you apply
21 the Michigan common law governmental immunity and it has as its
22 element you have to be a governmental employee acting within
23 the scope of your employment. So the very same actors doing
24 the very same things where the FTCA explicitly waives immunity
25 get to somehow incorporate the state law immunity even though

1 the FTCA applies the standards that would be applied to a
2 private person, not a government actor.

3 THE COURT: Well, even under Valdez or Valdez, however
4 you pronounce it, which I think was Judge Jonker's opinion,
5 correct?

6 MR. JAICOMO: That's correct.

7 THE COURT: He cites the Sanders case which
8 establishes a two-prong test, if you will: First, that the
9 officers were acting in good faith; but second, which is what
10 seems to be at issue here, is that the officers have reasonable
11 articulable grounds to believe that the suspect is the intended
12 arrestee. Which I assume the plaintiff is arguing they could
13 not have under the fact situation.

14 MR. JAICOMO: That's correct, Your Honor.

15 THE COURT: So even if Valdez or Valdez applies, I'm
16 not sure it swings in the defendant's favor.

17 MR. JAICOMO: I agree with you. And I would also
18 point out that for the Valdez case for the governmental
19 immunity to apply they have to be operating in good faith. We
20 have alleged bad faith here in several different respects,
21 among them the malicious prosecution, lies that were told, and
22 the intentional infliction of emotional distress claim.

23 So then turning to the tort issues again. I've
24 already said this several times. These are all issues of fact.
25 It's all he said, he said, they say he did this, he said they

1 did that; I just don't see how that's not an issue for the jury
2 to decide, Your Honor.

3 THE COURT: Thank you. Let me now hear from defendant
4 Morris's counsel, please.

5 MS. REWA: Thank you, Your Honor. The only claim
6 against Officer Morris is the malicious prosecution claim.
7 Frankly, under the four elements as articulated by the Sixth
8 Circuit, I can proceed without any evidence and prove that the
9 first element of the malicious prosecution cannot be met as a
10 matter of law. And that is that Officer Morris aided, made,
11 decided, or influenced the prosecution.

12 The facts as alleged in the complaint, even if you
13 accept them as true, cannot establish that element and
14 therefore that claim will fail.

15 Now, one of the other elements in this cause of action
16 as articulated by the Sixth Circuit is the absence of probable
17 cause. That would require in my estimation evidence that was
18 produced at trial, the trial transcript, to show that no
19 reasonable officer based on the evidence that was presented, no
20 reasonable officer in Officer Morris's position with the
21 interaction or lack of interaction that she had with the
22 criminal trial would have known that there was not probable
23 cause to continue the detention after the charge was made all
24 the way up to trial.

25 That's, that's the point really that is

1 Officer Morris's position. I can proceed on a 12(b)(6) without
2 evidence, but to the extent the government is going to present
3 information like the criminal trial transcripts, trial
4 exhibits, things of that nature, I'm kind of making a me too
5 argument. If it's already there, and the Court is already
6 going to look at it, I also want to make that argument for
7 Officer Morris so I can win on two prongs, not just one. Do
8 you have any questions on that?

9 THE COURT: I don't.

10 MS. REWA: Okay. As it pertains to, you know, what
11 are we calling this motion, what is the standard we are doing.
12 I think it makes sense that we look at Rule 56 now because in
13 my experience if you look at Rule 12(d) where if we are
14 bringing in evidence, either the federal defendants because
15 they have a subject matter jurisdiction, or we are litigating a
16 very specific aspect of the case like probable cause and
17 information that came out in the criminal jury trial, it makes
18 sense to make this determination now of the Court either giving
19 us notice for, okay, you know, the defendants have presented
20 this evidence but they filed a 12(b)(6). I am now giving you
21 notice you have 30 days because I'm going to convert this into
22 a Rule 56. In my experience, that's what has happened in the
23 past with motions I filed. And so I'm kind of hoping we can
24 have this conversation now to sort of short circuit that so we
25 all know what standards the judge wants to rule on these

1 motions so there is no question of what the standards are going
2 to be for the determination of the dispositive motions.

3 And when we look at the discovery disputes. You look,
4 for example, Rule 56(d) says, "When a dispositive motion is
5 filed and the nonmovant needs additional information in order
6 to overcome that motion, there is a procedure for that." There
7 is a declaration or affidavit saying, I can't adequately defend
8 myself here against this dispositive motion because I don't
9 have XYZ. I really haven't heard that yet from plaintiff. But
10 I just hear everything is rife with questions of fact. But
11 what are the material questions of fact that we need to know in
12 order to resolve this motion that we are proceeding or hoping
13 to proceed at this instant. What does plaintiff need to
14 overcome our qualified immunity. I did hear earlier today
15 trial transcripts. Okay. That's something that we can talk
16 about. So what, what information, what documentation do they
17 need in order to look at the probable cause determination and
18 what people knew when in the course of the criminal trial.

19 And when we are talking particularly about malicious
20 prosecution claim, I think of all -- against all of the
21 defendant officers, I think it's appropriate to look at the
22 trial transcript, the trial documents; that's a discreet set of
23 information that's already established that we all can readily
24 have available to us and provide and produce. I might be
25 speaking out of turn but I think we can provide trial

1 transcripts. So let's litigate that, let's litigate within
2 this realm of this limited scope of what was probable cause
3 during the course of the trial.

4 So I guess I would ask the -- put the onus perhaps on
5 the plaintiff to tell us what does plaintiff need in order to
6 overcome or look at being able to defend against our
7 dispositive motions, particularly for those claims that are
8 necessarily tied in to what happened with the criminal trial.

9 THE COURT: Well, I'm not sure that limitations on
10 discovery have to be quite that narrow. If we're talking about
11 my case management discretion, I think it may be broader than
12 you suggest. I have to think about that a little bit. But I
13 do think that to say that the plaintiff has to specifically
14 delineate exactly what he needs in order to, just in order to
15 defend the motion, I'm not sure that the limitation has to be
16 that stringent. I don't know.

17 MS. REWA: I think when we are talking about the issue
18 of qualified immunity, so now again with things like malicious
19 prosecution, it's specific to the officers, it's immunity from
20 suit not just liability. And so, you know, I would object to
21 having to turn over the GRPD officers's personnel files. How
22 does that play into what we need now to decide these initial
23 issues of qualified immunity? And so maybe what we all need to
24 do is kind of sit down and hash out, figure something out. But
25 I think we, we need to recognize that the officers have a right

1 to qualified immunity to be determined at the earliest instance
2 in which it's possible.

3 Now there might be issues of fact that there are some
4 things that we are just going to have to litigate. But I think
5 some of this, some of these issues, particularly the malicious
6 prosecution can be resolved very early on with little or no
7 discovery.

8 And I will note too that the case cited by plaintiff
9 in his response in opposition to the discovery brief, and I'm
10 looking particularly at page ID 189, this is the Alspaugh case,
11 A-L-S-P-A-U-G-H v McConnell, 643 F.3d 162, 2011. So if you
12 read that entire case, what's interesting is in that instance
13 the government defendants did not allow any discovery. They
14 did not produce any discovery against two of the claims that
15 this prisoner plaintiff brought. It was an excessive force and
16 a deliberate indifference in medical care. It was an Eighth
17 Amendment case. The Court found that it was actually
18 inappropriate based on the facts of the case to rule on the 56
19 motion for excessive force because there were fact issues for
20 which discovery was needed so that plaintiff could defend
21 himself.

22 But as to the deliberate indifference, the defendants
23 could already establish as a matter of law that the medical
24 providers were not deliberately indifferent. And so the Court
25 upheld the grant of the dispositive motion on that claim

1 because no amount of discovery was going to save that claim.

2 And I think that's the point here is I think all of
3 the defendants are arguing no amount of discovery is going to
4 save some or all of these claims. That's certainly my position
5 with Officer Morris. Particularly where we have as here
6 probable cause I think, and what any of the officers would have
7 known I think rises or falls on what happened at the trial.

8 Are there any further questions?

9 THE COURT: Not from me, thank you.

10 MS. REWA: Thank you.

11 THE COURT: Can you tell me exactly what Officer
12 Morris did?

13 MR. JAICOMO: Sure. She instructed two bystanders
14 that they were required to delete footage of the incident.
15 It's very clear on the dash cam footage which only recorded her
16 voice, the car was not facing wherever she was standing, but
17 she clearly stopped two people who were there for the incident,
18 she stood with them and she said something along the lines of
19 no, no, no, we don't need pictures; we are going to tell the
20 story without pictures like we used to do. And then she orally
21 talked them through deleting the footage and confirmed orally
22 on the tape that they had deleted the two videos. And in so
23 doing, especially coupled with her statement, it's very clear
24 that her actions were intended to harm Mr. King and cover for
25 the officers who were involved.

1 THE COURT: Okay.

2 MR. JAICOMO: And with respect to discovery, I'll just
3 say that when the other side already concedes that some amount
4 of discovery is necessary, I agree with that. I think, you
5 know, I'm not prepared to argue every jot and tittle of what we
6 need, but, for instance, we definitely would need all the
7 investigatory materials that led them to look for Mr. Davidson
8 and find instead Mr. King. And all the things like that that
9 we don't have that's not in the trial. The trial was conducted
10 by a prosecutor against James King. It doesn't tell some
11 wonderful neutral story. This was aimed at putting James in
12 prison for a decade. So to say that we can rely solely on the
13 trial transcript I don't think.

14 THE COURT: What was he charged with?

15 MR. JAICOMO: He was charged with assaulting an
16 officer, for the FBI agent, assaulting an officer resulting in
17 bodily injury, for the Grand Rapids police detective, and then
18 assault with a dangerous weapon because they claimed, this is
19 another malicious prosecution basis, one or both of the
20 officers claimed that they were able to clasp one handcuff on
21 James's wrist at some point during this altercation, and that
22 he then attempted to use the handcuff as a weapon. And, you
23 know, just saying that actually makes me want to point out, for
24 example, if the footage that Officer Morris hadn't ordered
25 destroyed still existed, we could probably see that James

1 wasn't using handcuffs as a dangerous weapon to harm these
2 officers. So that claim goes out the window.

3 THE COURT: Okay. Thank you. Rita, do you have any
4 questions that haven't been covered?

5 THE LAW CLERK: No, thank you.

6 THE COURT: Okay. Well, I'm sorry.

7 MS. MAZZOCCO: Your Honor, could we have a brief
8 response?

9 THE COURT: Sure.

10 MS. MAZZOCCO: Okay. Thank you, Your Honor. Very
11 briefly. First of all, I just wanted to point out that neither
12 myself nor Officer Morris's counsel has conceded that discovery
13 is necessary to resolve these motions. Plaintiffs have said
14 that oh, there are these issues of fact, but they haven't had a
15 chance to read our brief yet. In our brief we will explain to
16 the Court why we are relying only on plaintiff's versions of,
17 version of these events and why because of that our folks are
18 entitled to be dismissed out of this case, Your Honor. And
19 importantly, Alspaugh or any of the -- none of the other cases
20 that plaintiff cited in their motion to stay actually addressed
21 the issue of whether a stay ought to issue and decided that it
22 shouldn't.

23 The Sixth Circuit in none of those cases has addressed
24 that point in the cases that they are citing. The cases that
25 we presented show the Court that whether or not we ultimately

1 prevail on the qualified immunity issue, we have a right to
2 have the Court look at our brief, look at the arguments, and
3 then make that determination before we are subjected to
4 discovery.

5 THE COURT: Well, I guess I don't really agree with
6 that. I think, again, that within my discretion to manage my
7 docket, I do have the power to deal with that issue before --
8 you may sit down -- before I've read your brief. And
9 interestingly, Rita found an interesting case I think out of
10 the northern district of -- I think it's Northern District of
11 Ohio, it's unreported, admittedly, but it has some interesting
12 language, and Judge Breen, whom I know a little bit, I do have
13 considerable respect for, but he made the attempt to balance
14 that issue, the issue of whether discovery should proceed under
15 these circumstances. And I think you might want to take a look
16 at that before you write your brief. The case is Moore,
17 M-O-O-R-E, versus Henderson County Sheriff's Department, and
18 the 2014 Westlaw number is 1745017.

19 So here's what we're going to do. First of all, I do
20 think that we can move ahead kind of on a dual track, if you
21 will, with the government and individual defendants, Brownback
22 and Allen, filing a joint brief in support of their motions, to
23 which the plaintiff then can obviously respond. I think that
24 the Morris defendant should be a separate brief. You know, we
25 may end up with a single opinion, probably will, but I just

1 think that it will be cleaner to proceed in that way. The
2 issue of staying discovery, my sense is that it is something
3 that you need to try to hash out and probably will need Judge
4 Carmody's assistance doing that. And I will say that I'm going
5 to grant it in part and deny it in part. I'm not going to
6 allow, and I will talk with Judge Carmody about this if you all
7 can't decide what should be under that part of the order, but
8 the, I do think that, again, based on my docket needs to keep
9 this case moving that some discovery ought to be allowed to go
10 forward. Now I did take a look at the interrogatories, or some
11 of the interrogatories, and requests that were filed. And I
12 think Judge Carmody would agree with me, some of them are
13 reasonable and apt and some of them are clearly much too broad
14 to be considered, particularly at this stage of the
15 proceedings.

16 So all of that being said, the two defense briefs will
17 be required to be filed, to be served, the motions and briefs
18 within 28 days. The plaintiff's two responses must be served
19 within 28 days of service of the defendant's briefs.
20 Defendants will then have 14 days to respond to the plaintiff.

21 If at all possible, it would be very helpful to have a
22 joint statement of undisputed material facts. Now, it may not
23 be possible, I don't know. It really does seem to me that
24 there are an awful lot of disputed facts here. And how that
25 will play out in the briefing and decision on the motions, I'm

1 not sure. But if you can come up with a paragraph by
2 paragraph, numbered paragraphs of facts that nobody disagrees
3 with, simple things like, Mr. King was walking down whatever,
4 Madison Avenue, at 3:00 o'clock in the afternoon of July 15,
5 2015. Whatever the dates are. But I think it does two things
6 to do that, to come up with an undisputed material fact
7 statement: Number one, I think it helps you organize your own
8 thoughts, but number two it really helps us in drafting the
9 opinion. It serves as kind of a back bone for the statements
10 of facts in the opinion that will come out.

11 Also, I would urge you to come up with a joint exhibit
12 book. It seems to me that the exhibits here need not be
13 duplicated. If you are going to, for instance, submit the
14 trial transcripts, please don't give me two. And talk to one
15 another and collaborate with one another. And as I say, on the
16 issue of the stay, if you can't agree then somebody is going to
17 have to get before Judge Carmody and get that sorted out.

18 One other thing about the briefing process, and that
19 is that after, and this will be for the individual defendants,
20 the two sets of defendants, once all of your briefs have been
21 exchanged and served on each other, then it is the moving
22 parties, the defendants's obligation to provide chambers with
23 courtesy hard copies of everything that has been exchanged.
24 You'll each be responsible to file electronically with the
25 court your various documents, and certainly your proofs of

1 service when you serve each other. But the defendants do have
2 that additional duty to provide me with a bundle of everything
3 that has been filed in a particular part of the motion.

4 What have I left out, Rita?

5 THE LAW CLERK: Do you want to confirm the answer
6 deadline is extended?

7 THE COURT: Yes.

8 THE LAW CLERK: Mention oral argument.

9 THE COURT: Yes. Answer deadline will be extended
10 until after a decision on the merits of the motions.

11 Do any of you have any questions, comments, concerns?

12 MS. MAZZOCCO: Your Honor, the government would
13 respectfully request 45 days for our brief. Mr. Cobb is going
14 to be in Africa, and then also due to the joint statement of
15 facts, we think it would be helpful to have a little bit more
16 time to get that ironed out so our brief can take that into
17 account as well.

18 THE COURT: I think that's not unreasonable.

19 MS. MAZZOCCO: Thank you, Your Honor.

20 MS. REWA: Your Honor, may I ask clarification? The
21 deadline for the joint statement of facts and joint exhibit
22 list would be the same day as the defendants's briefs?

23 THE COURT: Correct.

24 MS. REWA: That would be one global that would cover
25 all of the defendants's briefs filed.

1 THE COURT: That would be delightful.

2 MS. REWA: We will try our hardest, Your Honor.

3 THE COURT: Great. Good to hear.

4 MR. PORTINGA: Your Honor, can I ask about timing on
5 the discovery issue? I understand the Court has denied the
6 motion to stay in part, granted it in part, and we are going to
7 confer on that. But our discovery was served more than 30 days
8 ago so the time is up. We want to make sure this doesn't drag
9 on too long. Can we have some sort of schedule to both confer
10 on this and get in front of Judge Carmody if we are not able to
11 resolve this?

12 THE COURT: That's fair enough, Mr. Portinga. I think
13 that 21 days to see if you can collaborate, and if not, then
14 28 days to, well, that's not very much. 35 days to get in
15 front of Judge Carmody. What you might do is get on her
16 calendar now just in the event that you can't come up to some
17 agreement.

18 MR. PORTINGA: Thank you, Your Honor.

19 THE COURT: On discovery. Anything else?

20 MS. MAZZOCCO: Your Honor, to that point I just wanted
21 to make sure I understood the scope of the granting in part of
22 the motion to stay discovery. Is what Your Honor is intending
23 to do to limit discovery to qualified immunity issues only?

24 THE COURT: No.

25 MS. MAZZOCCO: Okay.

1 THE COURT: Anything else?

2 MS. MAZZOCCO: Then, Your Honor, what is the scope of
3 the ruling? I'm not sure where we are to draw the line.

4 THE COURT: Well, again, I think that is -- it's my
5 attempt to punt the issue, and to encourage you to try to limit
6 yourselves to the extent that you can agree and if not, then to
7 -- I'm not giving unfettered discovery. I don't want to see
8 any attempts to go taking numerous depositions and so on and so
9 forth. But I think that, again, my purpose is to keep this
10 case moving because if a stay is granted at this point we are
11 going to be dragging this out for heaven knows how long. So
12 see if you can't among all six of you reach some reasonable
13 accord, and if not, then Judge Carmody will do it for all of
14 us. Okay.

15 MS. MAZZOCCO: Thank you, Your Honor.

16 MR. JAICOMO: Thank you, Your Honor.

17 THE COURT: Thank you all for your presentations.
18 They were very helpful, and I'm hopeful that the briefing will
19 be as well. Good. Thank you. We are adjourned.

20 THE LAW CLERK: All rise, please. Court is adjourned.

21 (Proceedings concluded, 11:04 a.m.)
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REPORTER'S CERTIFICATE

I, Kathy J. Anderson, Official Court Reporter for the United States District Court for the Western District of Michigan, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a full, true and correct transcript of the proceedings had in the within entitled and numbered cause on the date hereinbefore set forth; and I do further certify that the foregoing transcript has been prepared by me or under my direction.

/s/ Kathy J. Anderson

Kathy J. Anderson, RPR, FCRR

U.S. District Court Reporter

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